FILED

DEC 18 2003

CATHY A. CATTERSON
U.S. COURT OF APPEALS

**NOT FOR PUBLICATION**

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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| UNITED STATES OF AMERICA,<br><br>Plaintiff - Appellee,<br><br>v.<br><br>HERBERT LOUIS BURDEAU,<br><br>Defendant - Appellant. | No. 01-35314<br><br>D.C. No. CV-00-00010-FVS<br>CR-96-00042-FVS<br><br>MEMORANDUM* |

Appeal from the United States District Court
for the District of Montana
Fred L. Van Sickle, District Judge, Presiding

Argued and Submitted December 2, 2003
Seattle, Washington

Before: KLEINFELD, GOULD, and TALLMAN, Circuit Judges.

Herbert Louis Burdeau appeals the district court's dismissal of his 28 U.S.C. § 2255 federal habeas petition. We review de novo and affirm.[1]

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

[1] United States v. Ratigan, No. 01-35972 (9th Cir. Dec. 11, 2003).

Burdeau claims his attorney provided ineffective assistance of counsel by conveying to Burdeau the idea that he would receive a ten-year sentence if he went to trial, causing Burdeau to withdraw his plea.[2] Under Strickland v. Washington,[3] Burdeau must show that his attorney's performance was deficient and that the deficient performance prejudiced him.

As in United States v. Thornton,[4] the district court advised Burdeau that a maximum sentence under the Sentencing Guidelines was possible, "thus rendering any advice given by [Burdeau]'s counsel, even if erroneous, non-prejudicial."[5] Therefore, even if Burdeau's version of the hallway conversation were true, he does not state a claim of ineffective assistance.

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[2] The 17.5-year sentence Burdeau received after a jury trial was affirmed on direct appeal. United States v. Burdeau, 168 F.3d 352 (9th Cir. 1999).

[3] Strickland v. Washington, 466 U.S. 668, 687 (1984).

[4] United States v. Thornton, 23 F.3d 1532, 1533–34 (9th Cir. 1994) (per curiam).

[5] Id. at 1534.

"Where a section 2255 motion is based on alleged occurrences outside the record, no hearing is required if the allegations, viewed against the record . . . fail to state a claim for relief . . . ."[6] The district court did not err in dismissing the habeas petition without holding an evidentiary hearing.

**AFFIRMED.**

[6] Shah v. United States, 878 F.2d 1156, 1158 (9th Cir. 1989) (internal quotation marks and citations omitted); cf. Machibroda v. United States, 368 U.S. 487, 494–96 (requiring an evidentiary hearing because the petitioner was "clearly entitled to relief" if the allegations were true).